

**U.S. Department of Labor**

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**Issue Date: 30 December 2004**

CASE NOS. 2004-LHC-00657  
2004-LHC-00658

OWCP NOS. 01-157281  
01-149341

In the Matter of

**JOHN PAUL VADOVSKY**

Claimant

v.

**ELECTRIC BOAT CORPORATION**

Employer/Self-Insured

Appearances:

Richard P. Gudis, II (O'Brien, Shafner, Stuart,  
Kelly & Morris, P.C.), Groton, Connecticut,  
for the Claimant

Mark Oberlatz (Murphy & Beane), New London,  
Connecticut, for the Employer

Before: Daniel F. Sutton, Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

**I. Statement of the Case**

John Paul Vadovsky (the "Claimant"), who has been employed by the Electric Boat Corporation ("EBC") since 1977 as a pipe-fitter working on construction of submarines, claims workers' compensation benefits from EBC under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "LHWCA"), for work-related injuries and resulting permanent disability involving his upper extremities. The claims were referred to the Office of Administrative Law Judges ("OALJ") for hearing after an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP") failed to produce a mutually satisfactory resolution.

Pursuant to notice, a formal hearing was conducted before me in New London, Connecticut on May 26, 2004, at which time the Claimant appeared represented by counsel, and an appearance was made on behalf of EBC. The Claimant testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-15 and 17<sup>1</sup> and EBC Exhibits ("EX") 1-8. Hearing Transcript ("TR") at 15, 21. At the close of the hearing, leave was allowed for filing post-hearing briefs which were received from both parties. Thereafter, EBC filed an objection to an assertion made in the Claimant's brief, and the Claimant in turn responded to EBC's objection. While no provision was made for submission of legal argument beyond the post-hearing briefs, I find that the parties' additional comments are pertinent, and they have been considered. The record is now closed.

Upon review of the evidence of record and consideration the parties' arguments, I conclude that the Claimant is entitled to an award of permanent partial disability compensation for a work-related loss of use of his upper extremities, plus interest, penalties and attorney's fees. My findings of fact and conclusions of law are set forth below.

## **II. Findings of Fact and Conclusions of Law**

### **A. Background**

The Claimant is a 52-year-old man who graduated from high school in 1971. TR 26-27. After graduating from high school, he worked in campground construction and plumbing and heating until 1977 when he was hired by EBC. TR 27-28. At EBC, the Claimant worked as a pipefitter building pipe systems for submarines. TR 28-29. This work required him to operate a variety of vibratory power tools such as etchers, grinders, drills and impact wrenches, frequently for hours at a time. TR 31-40. He eventually developed symptoms of pain, cramping and numbness accompanied by loss of function in his hands and arms for which he sought medical treatment. Based on the opinion of his treating doctor that his hand condition, which has progressed to a level of permanent impairment, is related to his use of vibratory tools at EBC, the Claimant seeks benefits under the LHWCA.

Regarding his current condition, the Claimant testified that despite four surgical procedures, he still experiences frequent cramping and numbness in his upper extremities, although less so than before surgery, and he said that his arms go numb when he attempts to do overhead work. TR 44. Much of the work available in the shipyard is overhead repair work, but the Claimant has been able to avoid most overhead work because he is a work leader. TR 45. The Claimant also testified that he has to climb vertical ladders on submarines and that he gets a shocking feeling or jolt in his left hand after six or seven rungs. TR 46. In addition to these problems on the job at EBC, the Claimant said that he has difficulty driving long distances because his arms begin to go numb after 15 or 20 minutes. TR 47. He is also no longer capable of doing yard work at his home, and he reduced the amount of leisure time that he spends fishing and restoring automobiles. TR 47. Despite these problems, the Claimant testified that he has asked his treating doctor not to place him on permanent work restrictions out of concern that he would be laid off by EBC if he were limited to light duty work. TR 57.

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<sup>1</sup> Claimant's Exhibit 16 was withdrawn. Hearing Transcript at 59.

## B. Stipulations.

The parties offered the following stipulations which are consistent with the evidence of record. Accordingly the stipulations are adopted and form the basis of the following findings of fact and conclusions of law:

1. The LHWCA applies to these claims;
2. The Claimant sustained injuries on June 2, 1997, February 28, 2000 and August 23, 2002 at EBC's shipyard in Groton, Connecticut;
3. The Claimant's injuries arose out of and in the course of his employment with the EBC;
4. There was an employer-employee relationship between EBC and the Claimant at the time of the injuries;
5. EBC was timely notified of the injuries, and the claims and notices of controversion were timely filed;
6. The informal conference was held on September 10, 2003;
7. The Claimant's average weekly wage was \$818.50 at the time of the February 28, 2000 injury and \$919.15 at the time of the August 23, 2002 injury;
8. EBC has paid the Claimant compensation, as set forth in LS-208 forms in evidence as EX 3, and medical benefits on account of all three injuries;
9. The Claimant reached maximum medical improvement from the June 2, 1997 injury on February 8, 2000, and he reached maximum medical improvement from the February 28, 2000 and August 23, 2002 injuries on May 19, 2003; and
10. The Claimant has maintained his usual employment at EBC.

TR 10-11. The parties also agree that the sole unresolved issue concerns the extent of the Claimant's disability under section 8 of the LHWCA. TR 11.

## C. Medical Evidence and Opinions

The Claimant initially sought treatment in July 1997 from his primary care physician for cramping in his fingers while working. CX 2 at 1. He was referred for an evaluation by a vascular surgeon, Sebastian Trombatore, M.D. who reported in September 1997 that his examination of the Claimant's upper extremities produced "equivocal" findings and no evidence of significant arterial stenosis. CX 3 at 1-2. Dr. Trombatore recommended further evaluation by a neurologist. *Id.* at 1. The Claimant was next seen by neurologist Gary A. L'Europa, M.D. who

reported that he found no evidence of cervical radiculopathy, entrapment neuropathy or carpal tunnel syndrome. CX 4 at 1. However, the Claimant continued to complain of worsening symptoms in his hands, and he was ultimately referred to Thomas C. Cherry, Jr., M.D., a plastic and hand surgeon who concluded after examining the Claimant in April 1998 that he had a fairly typical pattern of symptoms for work-related carpal tunnel syndrome, despite his negative nerve studies, but with an atypical expression in the form of aching instead of the more usual numbness and tingling. CX 6 at 1-2. Based on these conclusions, Dr. Cherry recommended carpal tunnel release surgery. *Id.* at 2.

EBC had the Claimant examined by another hand surgeon, William A. Wainwright, M.D., in August 1998. RX 4 at 1-3. Dr. Wainwright's examination was normal, and although he agreed with Dr. Cherry's assessment that carpal tunnel syndrome in rare cases can present in a manner similar to that seen in the Claimant's case, he recommended that surgery not be performed in light of the negative electrical diagnostic studies and physical findings. *Id.* at 3. Dr. Cherry re-examined the Claimant on October 26, 1998 in light of Dr. Wainwright's recommendation, but he continued to be of the opinion that the Claimant was suffering from an atypical case of carpal tunnel syndrome which was related to his employment at EBC and which would be relieved by surgery. CX 6 at 5.

Notwithstanding Dr. Wainwright's misgivings, EBC authorized the surgery recommended by Dr. Cherry who performed right and left carpal tunnel and canal of Guyon releases, median neurolyses, and flexor synovectomies in May and June 1999. CX 8, 9. Six months following the surgeries, Dr. Cherry reported that the Claimant had reached a point of maximum medical improvement with respect to his bilateral carpal tunnel syndrome, and he assessed the Claimant with five percent permanent partial disabilities of each hand. CX 6 at 9. He emphasized that these disability ratings were based on the carpal tunnel syndrome and release procedures alone "and is exclusive of any future problems or disabilities that may arise at his elbow or elbows." *Id.* EBC paid the Claimant temporary total disability compensation for periods when he was unable to work due to the carpal tunnel syndrome and surgical procedures, and it voluntarily paid him permanent partial disability compensation in the total amount of \$12,688.00 based on Dr. Cherry's assessment of a five percent permanent partial disability involving each hand. EX 3 at 1.

At the same time that he reported that the Claimant had reached maximum medical improvement following the carpal tunnel release procedures, Dr. Cherry diagnosed a new condition, cubital tunnel syndrome involving the left elbow, which he also described as work-related. CX 6 at 9. In August 2000, Dr. Cherry reported that there had been a significant worsening of his left elbow condition with daily numbness, tingling and aching, particularly while working, but that the Claimant's carpal tunnel syndrome was doing "quite well." *Id.* On February 26, 2001, after the Claimant reported increasing left arm symptoms, Dr. Cherry prescribed a course of Vioxx which the Claimant was unable to tolerate. *Id.* at 11-12. The Claimant then underwent a nerve conduction study which was negative for any ulnar neuropathy at either the left wrist or elbow, although Dr. Cherry noted that the Claimant still complained of daily symptoms of numbness and tingling. *Id.* at 12. In view of the Claimant's complaints of increasing symptoms, Dr. Cherry decided in September 2001 to request authorization from EBC for surgery on the left elbow. *Id.* at 12-13. The surgery was authorized and scheduled for May

2002. About a week before the surgery, the Claimant saw Dr. Cherry for a pre-operative consultation and reported that right elbow was beginning to “act up.” *Id.* at 13. Dr. Cherry stated, “[c]learly, the same forces at work are causing the problems on the right as on the left and it is likely that this will progress to a point where surgical intervention is needed, as that it the nature of cubital tunnel syndrome or ulnar neuritis at the elbow.” *Id.* Dr. Cherry performed a submuscular transposition of the left ulnar nerve on May 10, 2002, and he performed the same procedure on the Claimant’s left elbow on August 23, 2002. CX 12, 13.

Dr. Cherry continued to follow the Claimant’s progress during his convalescence from the bilateral elbow surgeries. On January 13, 2003, he reported that the Claimant had undergone vascular studies and “cold challenge” testing which showed a “mild level of vasospastic disease or cold sensitive fingers consistent with his complaints of a mild to moderate nature consistent with a mild form of vibratory tool induces vasculitis and neuropathy.” CX 6 at 21. At that time, he tentatively assigned the Claimant “an additional rating of 10% to each upper extremity for the vascular component and the ulnar nerve transpositions combined . . .” *Id.* Dr. Cherry saw the Claimant next on May 19, 2003. At that time, he reviewed the Claimant’s history and current reported symptoms and stated that he would assign the Claimant an additional 14 percent permanent partial disability rating, consisting of ten percent for his ulnar nerve symptoms and four percent for the vascular component, for each upper extremity “over and above” the five percent disability ratings previously assigned to the Claimant’s hands based upon the carpal tunnel syndrome and release surgeries. *Id.* at 22.

Dr. Cherry’s deposition was taken on March 10, 2004. RX 7. He testified that he is board-certified in the specialty areas of plastic and hand surgery. *Id.* at 5-6. Regarding his assignment of additional permanent partial disability ratings, Dr. Cherry explained that the additional ten percent rating for each upper extremity is based on the Claimant’s ongoing problems with the ulnar nerves at the elbow and that the additional four percent disability for each upper extremity is based on the vascular component of his condition which he believes to be related to the Claimant’s use of vibratory tools in his work at EBC. *Id.* at 23-24. He testified that he did not use any particular medical text, such as the American Medical Association’s Guides to the Evaluation of Permanent Impairment (the “AMA Guides”), in arriving at the Claimant’s disability ratings and instead relied upon the knowledge of the Claimant’s findings and symptoms that he gained over the course of treatment for five years. *Id.* at 24. While he does refer to the AMA Guides, he said that he does not follow them “slavishly, because I think that there are major areas of dysfunction that are not even addressed there or that are ignored by them.” *Id.* at 25. Dr. Cherry conceded that his methodology for rating disability, which is based on his experience with rating the disability of hundreds of patients as well as reviewing ratings given by other physicians, is not written down and has not been peer-reviewed. *Id.* at 26-27. He was questioned further about the basis for the initial five percent ratings that he assigned to the Claimant’s hands, and he responded that he had not recorded the results of his physical examination and only “crudely” measured the Claimant’s grip strength. *Id.* at 28. He further testified that he thought that the five percent ratings fairly represent the extent of the Claimant’s loss in terms of diminished capacity to engage in sustained physical activity without symptoms, disruption to the anatomy of his hands and the permanent increase in palm sensitivity that comes with carpal tunnel release surgery; that is, he feels that the “five percent fairly represents someone who has had a good, but not a great result from carpal tunnel release.” *Id.* at 29. With

regard to the additional ten percent ratings that he assigned to the Claimant's upper extremities following the ulnar nerve surgeries, Dr. Cherry stated that he had conducted a "relatively limited" physical examination and "a crude test of grip strength." *Id.* He explained that "what I did is took his current findings and what he told me about what he could and could not do, which I give far more credence to than the guides allows for." *Id.* at 30. He further elaborated,

But the problems that he had with the elbow, I thought were substantial. I think he was better. But he shows when he does overhead work or repetitive things using the arms, his arms do cramp up and he has a considerable decrease in tolerance for use and stress in the arms and gets recurrent numbness and aching in that ulnar distribution. And I think that is, for a man who makes his living doing heavy physical work, I think that's a substantial loss that was fairly represented by the ten percent disability.

*Id.* Thus, Dr. Cherry agreed that a large part of his disability assessment is based upon the Claimant's history and subjective account of his symptoms, but he added that he found the Claimant to be credible in comparison to some other injured workers who exaggerate their symptoms, so he "gave a large degree of credence to what he told [me]." *Id.* at 30-31. Dr. Cherry similarly testified that his assessment of an additional four percent disability rating for the vascular component of the Claimant's condition was not based on the AMA Guides, and he candidly admitted that the method for rating vascular impairments "is a point of confusion with me." *Id.* at 31. He said that he had seen ratings from other doctors as high as 30 percent for vascular damage from use of vibratory tools and suggested that his four percent rating was conservative, though he acknowledged that he was not entirely confident in the accuracy of his assessment:

So this is – I mean, I personally feel that my ratings for these vascular symptoms are on more tenuous ground than some of the other things, because it's – I don't think the Guides are helpful at all in this. And if you use the Stockholm scale you end up with these – which I haven't looked at in a long time. But they were just basically people [who] provided systematic ratings for these things, which I think are limited to the upper extremities that's what gets shook, if you will, in the vibratory tool. So, I mean, I don't know if that's an answer or – but on the basis of this is that I felt that that was a conservative rating for someone who does have, I believe, some problems related to long-term vibratory tool exposure.

*Id.* at 32. Dr. Cherry discussed the Claimant's injuries to the ulnar nerves in his elbows, and he described the surgical procedure which involves a transposition of the ulnar nerve to make it less vulnerable to irritation from repetitive use. *Id.* at 38-40. While he felt that the Claimant obtained a good result from the surgery, he explained that he was left with some residual symptoms as well as a violation to his anatomy from the surgical intervention. *Id.*

Dr. Cherry also addressed his disability ratings for the Claimant's upper extremities during his testimony at a deposition taken in another matter involving the same parties, *Ellis v. Electric Boat Corp.*, Case Nos. 2004-LHC-00619 & 2004-LHC-00620. CX 17. Specifically, he was asked to compare his upper extremity ratings in the two cases, and he responded that he gave

the worker in the *Ellis* case a ten percent rating even though she had not undergone surgery based on her symptoms, while the Claimant's ten percent rating was based on the anatomical disruption due to surgery. *Id.* at 23.

EBC arranged for the Claimant to be examined by Dr. Wainright a second time on January 7, 2003 after his ulnar nerve surgeries. RX 4 at 4-8. In addition to reviewing the Claimant's work history and medical records and conducting his own physical examination, Dr. Wainright had the Claimant independently evaluated by "a certified hand therapist." *Id.* at 7. He agreed that a five percent permanent partial disability rating for the Claimant's hands was reasonable under the AMA Guides based upon his carpal tunnel syndrome, and he stated that there were two methods under the AMA Guides for evaluating the Claimant's upper extremity impairment due to cubital tunnel syndrome -- one yielding an additional five percent impairment for each hand, and the other producing a six percent impairment for each hand. *Id.* at 7-8. Averaging these results, Dr. Wainright arrived at a combined permanent partial disability rating of eight percent for each hand. *Id.* at 8. He also stated that the Claimant had no evidence of vascular disease and that he expected the results of vascular testing, which had been conducted on December 11, 2002 (CX 14), to be normal. *Id.*<sup>2</sup> Therefore, he found no basis for assigning the Claimant any additional disability percentage based upon a vascular injury. *Id.*

Dr. Wainright's deposition was taken on April 1, 2004. EX 8. He testified that he is board-certified in orthopedic surgery with a certificate of additional qualification in hand surgery, and he is a board-certified independent medical examiner. *Id.* at 5. He reviewed the results of the December 11, 2002 vascular tests (CX 14) and stated that he found the test results to be normal. *Id.* at 9-10. In this regard, he explained that the ice water used in the test was "too cold, too brutal" and, thus, caused "false positive results." *Id.* at 10. He agreed with Dr. Cherry's diagnoses of bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome, and he testified that the Claimant had reached a point of maximum medical improvement from both conditions after the surgeries. *Id.* at 11, 17-18. Dr. Wainright said that he utilized the Fifth Edition of the AMA Guides in formulating his opinions on the extent of a permanent partial impairment rating. *Id.* at 12. He then explained that the Claimant had a six percent sensory impairment using Tables 16-10 and 16-15. *Id.* at 12-13. He noted that the Claimant does not have a motor impairment that is ratable under Table 16-11, or a vascular impairment ratable under Table 16-17 of the AMA Guides, Fifth Edition. *Id.* at 13-14. Thus, he assigned the Claimant a total impairment rating of six percent for both hands. *Id.* at 14. Dr. Wainright further testified that he also considered an alternative method under the AMA Guides which produced a 10 percent impairment of both hands. *Id.* at 14-15. He said that he used the average of these two ratings to reach a final rating of 8 percent for both hands which he converted to seven percent for each upper extremity. *Id.* at 17-18.<sup>3</sup> It is his opinion that the AMA Guides provide an adequate method for determining the extent of disability due to the Claimant's carpal tunnel syndrome, cubital tunnel syndrome and the vascular component of his hand/arm vibration syndrome. *Id.* at

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<sup>2</sup> A. Tramontozzi, M.D. conducted the vascular testing and reported that "cold stress" testing (*i.e.*, measuring the response of the Claimant's finger temperatures before and after a 30-second immersion in ice water) was consistent with probable mild vasospastic disease, but his examination otherwise found no evidence of arterial obstructive disease in either arm. CX 14.

<sup>3</sup> EBC paid the Claimant additional permanent partial disability compensation in the amounts of \$11,917.43 (left) and \$13,382.68 (right) based on Dr. Wainright's seven percent upper extremity disability ratings. RX 3 at 2-3.

19-20. On cross-examination, he acknowledged that the AMA Guides address “impairment” which is defined as “loss of normal function” as distinguished from the concept of “disability” which considers the effect of an impairment on an individual’s lifestyle and occupation. *Id.* at 22. Dr. Wainright also stated that his impairment ratings were limited to the Claimant’s hands, although he agreed that the Claimant’s elbows and wrists had been operated on. *Id.* at 27. Additionally, he said that he did not place much reliance on the Claimant’s subjective complaints, explaining that “the problem we have with patients who have secondary gain is the more you complain, the more money you’re going to get, so it’s in their favor to complain a lot.” *Id.* at 34. However, when reminded that the Claimant had undergone four surgical procedures, Dr. Wainright said that he did not believe that the Claimant was motivated by a desire for secondary gain. *Id.* at 35. Finally, he testified that the AMA Guides did not provide for averaging ratings obtained from different tables. *Id.*

EBC also introduced a consultative report from Christopher R. Brigham, M.D. EX 6. Dr. Brigham is board-certified in occupational medicine, and he is the editor of The Guides Newsletter, an AMA publication on the use of the AMA Guides, as well as primary editor of The Guides Casebook, a companion AMA textbook to the Guides. *Id.* at 6. In his report, Dr. Brigham reviewed the Claimant’s medical records including the disability evaluations from Drs. Cherry and Wainright. *Id.* at 1-4. He disagreed with Dr. Cherry’s disability ratings and characterized the overall quality of the latter’s report as “unsatisfactory.” *Id.* at 4. Dr. Brigham found “no objective findings that result in a ratable impairment” under the AMA Guides, but giving the Claimant “the benefit of considerable doubt”, he opined that there is an overall permanent impartial impairment of the upper extremities equal to one percent. *Id.* at 6.

#### D. Extent of Disability

The Claimant seeks compensation under section 8(c)(1) of the LHWCA based upon a 19 percent permanent partial disability of his upper extremities. He argues that section 8(c)(1) is applicable, as opposed to section 8(c)(3) which provides compensation for loss of use of a hand, because his injuries involve the elbows and wrists as well as his hands. Claimant’s Brief at 21-22. He contends that Dr. Cherry’s opinions should be given greatest weight in view of his long-term treating relationship and because approach of rigid adherence to the impairment tables in the AMA Guides used by Drs. Wainright and Brigham is inappropriate for measuring the full extent of the Claimant’s disability under the LHWCA. *Id.* at 15-21.

EBC does not dispute that the Claimant suffers from a permanent partial disability involving his arms which is attributable to work-related carpal tunnel and cubital tunnel syndrome and which should be compensated under section 8(c)(1) of the LHWCA. EBC Brief at 9. However, it argues that the extent of the Claimant’s disability was properly assessed by Dr. Wainwright under the AMA Guides at 7 percent, and it urges that Dr. Wainright be credited over Dr. Cherry because the AMA Guides provide a uniform and reliable basis for measuring disability and because his opinion is generally supported by Dr. Brigham, an expert in evaluating impairment under the AMA Guides. *Id.* at 10-13. EBC additionally argues that Dr. Cherry’s opinions should be disregarded because they are not based on any objective, medically-accepted criteria other than Dr. Cherry’s own personal opinions and beliefs. *Id.* at 13-14. Lastly, EBC stated in its reply brief that Dr. Cherry gave the Claimant disability ratings of five percent for his



hands and 14 percent for his upper extremities, not 19 percent for his upper extremities as asserted by the Claimant.

On this threshold question regarding the proper interpretation of Dr. Cherry's disability ratings, I find that EBC has it right. As outlined above, Dr. Cherry initially assigned the Claimant a five percent rating for his hands based upon his carpal tunnel syndrome and the residue of the first two surgeries. CX 6 at 9. The extent of permanent disability involving the Claimant's hands is not at issue since Dr. Wainright agreed that the five percent ratings are reasonable; RX 4 at 7; and since EBC has already made voluntary permanent partial disability compensation payments to the Claimant pursuant to section 8(c)(3) based upon Dr. Cherry's five percent hand disability ratings. EX 3 at 1. Following the third and fourth surgeries in which Dr. Cherry transposed the ulnar nerves in the Claimant's elbows, he assigned additional disability ratings totaling 14 percent for each of the Claimant's upper extremities. CX 6 at 21-22. While Dr. Cherry described these later ratings as "over and above" his five percent hand ratings, there is no doubt from his reports and deposition testimony that the initial five percent rating was for the Claimant's hands, and the 14 percent is for the Claimant's upper extremities based upon his elbow and vascular problems.

As for which expert opinion should carry the greater weight, the Claimant correctly argues that an ALJ is bound by the expert opinion of a treating physician on the existence of disability unless the physician's opinion is outweighed by substantial evidence to the contrary. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2nd Cir. 1997). But the issue here is not the existence of a disability since it is admitted that the Claimant has a permanent partial disability for which he is entitled to receive compensation under section 8(c)(1). The question is what is the proper rating of that disability or more precisely, what is the extent of his compensable loss? In answering this question, an ALJ is not required to accept the opinion of any physician on the extent of a claimant's loss and has the "discretion to assess a degree of disability different from the ratings found by the physicians if that degree is reasonable." *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891, 897 (1981). And, while it is recognized that the AMA Guides are "a standard reference widely used by physicians in testimony" addressing the extent of disability; *Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583, 585 (1979); an ALJ is not "bound to apply the Guides or any other particular formula for measuring disability." *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053, 1055 (1978). Thus, it is well-established that an ALJ "is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of claimant's disability." *Brown v. National Steel and Shipbuilding Co.*, 34 BRBS 195, 201 (2001).

After considering the evidence of record in light of this precedent, I find that strict reliance on the AMA Guides, as advocated by Drs. Wainright and Brigham, results in an underestimation of the severity of the Claimant's disability and, hence, inadequate compensation for his loss. In this regard, I find it significant that Dr. Wainright conceded that the AMA Guides focus solely on "impairment" or "loss of normal function" as measured by the evaluator rather than "disability" or "loss of use" which is the basis for an award of compensation under section 8(c)(1). Moreover, Dr. Wainright testified that he gave no consideration to the Claimant's complaints about his symptoms and their effect on his ability to perform the regular duties of his

pipefitter job at EBC despite the absence of any objective reasons for discounting the Claimant's complaints and despite holdings by the Benefits Review Board's that it is appropriate to consider a claimant's ability to return to work at his or her regular job in assessing the severity of disability under section 8(c). *See e.g., Mazze*, 9 BRBS at 1055. At the same time, I cannot fully credit Dr. Cherry's 14 percent upper extremity rating given his inability to adequately explain the rationale underlying his assessment of an additional four percent for vascular problems, Dr. Wainright's uncontradicted criticism of the "cold challenge" test relied upon by Dr. Cherry to arrive at the four percent vascular rating, and the absence of testimony from the Claimant describing any significant upper extremity problems with exposure to cold. Consequently, I will credit Dr. Cherry's assessment of a ten percent permanent partial disability of the Claimant's upper extremities as reasonable, but I reject his assessment of an additional four percent based on a vascular injury.

#### E. Compensation Due, Credits, Interest and Penalties

As the parties agree, the Claimant's permanent partial disability resulting from the loss of use of his upper extremities is governed by section 8(c)(1) of the LHWCA which provides for compensation at two-thirds of the worker's average weekly wage for 312 weeks. 33 U.S.C. § 908(c)(1). In a case where the loss is partial, compensation is based on the proportionate loss or loss of use of the member. 33 U.S.C. § 908(c)(19). That is, the percentage of the Claimant's loss of use of his arms must be applied to the number of weeks set forth in section 8(c)(1) to arrive at the proportionate number of weeks of compensation. *See Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391-92 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569, (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513 (1986). Accordingly, I conclude that the Claimant is entitled to an award of permanent partial disability compensation at two-thirds of the stipulated average weekly wage at the time of the August 23, 2002 upper extremity injury (\$919.15) for 62.4 weeks (10% of 312 weeks for each arm). Payments will commence on May 19, 2003 which is the stipulated date of maximum medical improvement.

EBC is entitled to a credit pursuant to section 14(j) of the LHWCA in the dollar amount of its voluntary section 8(c)(1) payments which were based upon Dr. Wainright's seven percent upper extremity impairment ratings. *See Scott v. Transworld Airlines*, 5 BRBS 141, 145 (1976).<sup>4</sup> However, since all section 8(c)(1) compensation was not timely paid to the Claimant, I find that he is entitled to interest on any compensation payments that were not timely made. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

In addition to the customary interest on unpaid compensation, the Claimant seeks imposition of a ten percent penalty pursuant to section 14(e) of the LHWCA based upon EBC's failure to timely file a notice of controversy with respect to the amount of compensation it declined to voluntarily pay after Dr. Cherry issued his 14 percent

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<sup>4</sup> The applicable credit amounts are \$11,917.43 and \$13,382.68. *See* EX 3 at 2-3.

permanent partial disability ratings.<sup>5</sup> The section 14(e) penalty is assessed in cases where an employer fails to file a notice of controversion after a dispute arises over the amount of compensation due, even if some compensation is voluntarily paid. *See Browder v. Dillingham Ship Repair*, 25 BRBS 88, 90-91 (1991); *Lorenz v. FMC Corp., Marine & Rail Equip. Div.*, 12 BRBS 592, 595 (1980). While EBC objects to the Claimant's raising section 14(e) for the first time in his post-hearing brief, the Board has held that the assessment of a section 14(e) penalty mandatory and may be raised at any time. *McKee v. D.E. Foster Co.*, 14 BRBS 513, 517 (1981); *Johnson v. C & P Tel.*, 13 BRBS 492, 497 (1981). Accordingly, I will assess the section 14(e) penalty on any compensation due that was not timely paid because the record does not show that EBC filed a notice of controversion as required by section 14(d) with respect to the additional compensation that it failed to voluntarily pay after Dr. Cherry's upper extremity permanent partial disability ratings were issued on May 19, 2003.

#### F. Attorney's Fees

Finally, I conclude that the Claimant, having utilized an attorney to successfully establish his right to additional compensation, is entitled to an award of attorneys' fees under section 28 of the LHWCA. *See American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132 (2004), and the EBC will be granted 15 days from the filing of the fee petition to file any objection.

### III. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following compensation order is entered:

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<sup>5</sup> Section 14(e) of the LHWCA provides:

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e). The notice that must be filed in order to prevent assessment of a section 14(e) penalty is the notice of controversion required by section 14(d) which provides.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

33 U.S.C. § 914(d).

1. Electric Boat Corporation shall pay to the Claimant, John Paul Vadovsky, permanent partial disability benefits for the work-related loss of use of his arms pursuant to 33 U.S.C. § 908(c)(1) and (19) for a period of 62.4 weeks at the rate of \$612.77 per week commencing as of May 19, 2003, less a credit pursuant to 33 U.S.C. § 914(j) in the amount of \$25,300.11 for past voluntary compensation payments;

2. Electric Boat Corporation shall pay to the Claimant interest on all past due compensation, computed from the date each payment was originally due until paid, and the appropriate rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director;

3. Electric Boat Corporation shall pay to the Claimant a penalty of ten percent pursuant to 33 U.S.C. § 914(e) on all compensation payments not timely made;

4. The Claimant's attorney shall have 30 days from the date of this order in which to file an application for attorney's fees, and Electric Boat Corporation shall have 15 days from the date of service of the application to file any objection; and

5. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

**SO ORDERED.**

**A**

**DANIEL F. SUTTON**  
Administrative Law Judge

Boston, Massachusetts